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1955

# Remington-Rand, Inc. v. Thurman E. O'Neil : Brief of Respondent

Utah Supreme Court

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Skeen, Thurman, Worsley & Snow; Allen M. Swan; Attorneys for Respondent;

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Case No. 8379

**IN THE SUPREME COURT**  
**of the**  
**STATE OF UTAH**

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**FILED**

OCT - 5 1955

REMINGTON RAND, INC., a  
corporation,

*Respondent and Plaintiff,*

vs.

THURMAN E. O'NEIL and LOIS S.  
MACHADO, fdba A-1 TYPEWRITER  
COMPANY,

*Defendants,*

vs.

DALE E. GRANT and UTAH CASH  
REGISTER EXCHANGE, INC., a  
corporation,

*Appellants and Garnishee Defendants.*

**BRIEF OF RESPONDENT**

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Case No. 8379

BRIEF OF RESPONDENT

STATEMENT OF FACTS

The facts of the case as outlined in defendants' brief are substantially correct, but plaintiff believes it will aid the Court to better understand the case if further facts are chronologically stated with reference to the

manner in which the garnishee defendants, Dale E. Grant and Utah Cash Register Exchange, Inc., became indebted to defendant Thurman E. O'Neil and the court proceedings that followed.

Thurman E. O'Neil owned and operated business machines outlets in Salt Lake City and Provo, both known as A-1 Typewriter Company (R. 42). In July of 1954 these businesses were in serious financial condition and their doors were closed (R. 59). O'Neil, with an apparent intention of secreting his stock of merchandise, office furniture and equipment from his creditors (R. 60) sought a method whereby he could dispose of the same without either he or his transferee incurring liability under the Bulk Sales Law of Utah. One Hugh Snyder, an acquaintance of O'Neil's introduced him to the defendant, Dale E. Grant (R. 43, 80), and a scheme was contrived whereby a store would be opened in Salt Lake City and the business incorporated under the name, Utah Cash Register Exchange, Inc., and the business would receive the office furniture and equipment from O'Neil's Provo store and make sales of O'Neil's merchandise (R. 45, 46). Five valuable Sweda Cash Registers had been mortgaged to the Farmers State Bank at Woods Cross, Utah by O'Neil. Shortly after commencing his operation, Grant redeemed the chattel mortgage by payment of approximately \$3,000.00 to the bank (R. 82), using as funds cash which O'Neil had obtained through the sale of certain office machines following the closing of his doors in Provo and Salt Lake City (R. 47, 49, 54). There was no opening

inventory taken at the time Utah Cash Register Exchange began its existence in August, 1954 (R. 84), nor were there any bills of sale from O'Neil to Grant or Utah Cash Register Exchange, Inc., covering the merchandise, furniture and equipment transferred (R. 93, 43). Dale Grant held 495 shares of stock in the corporation, his wife, P. F. C. Grant, held 3 shares, and his brother-in-law, R. C. Collard, held the remaining 2 of the 500 shares authorized (R. 75). Although the business known as Utah Cash Register, Inc. was, according to public record, a corporation, Grant, O'Neil and Snyder had already agreed that they would each contribute to the business a certain amount of cash (R. 47) and, presumably, share in its profits. The business venture apparently operated smoothly until December of 1954 when it became evident that the business would not support Grant, O'Neil and Snyder (R. 48). In December, O'Neil made demand upon Grant for a sum in excess of \$5,000.00 (R. 49, 50, 51) which O'Neil contended Grant owed him because of O'Neil's contribution in cash, merchandise, furniture and equipment. Grant disputed the sum demanded by O'Neil and conferred with his attorney (R. 51, 61). Upon returning from his attorney's office, Grant announced to Snyder and one E. F. White, an employee of his company, that he had "whittled him (O'Neil) down to \$3650.00." Shortly thereafter O'Neil left the business, and was never paid any part of the money which Grant had indicated as owing him (R. 52).

In March of 1955, the attorneys for Remington Rand, Inc., which company had obtained a default judgment against O'Neil for \$4,243.82 and costs (R. 19), were informed of the above facts. Garnishments were served on Grant and Utah Cash Register Exchange, Inc. (R. 11, 13), and in their answers Grant stated that he was not indebted to O'Neil (R. 15), and Utah Cash Register Exchange, Inc. conveniently answered that the furniture and equipment at Utah Cash Register Exchange, Inc. was the property of O'Neil and that it claimed no interest in it (R. 16). Remington Rand, Inc. traversed the garnishees' answers and noticed in the Law and Motion Division of the District Court for Salt Lake County a hearing to determine the amount of indebtedness owed O'Neil by these garnishees. Replies were prepared to the garnishees' answers and were thought to have been served on both Grant and O'Neil, although the original reply (R. 34) filed at the Salt Lake County Court House did not indicate service by mailing or otherwise. It was not until the garnishee judgment was entered by the District Court against Grant and Utah Cash Register Exchange, Inc. that Remington Rand learned, by way of an affidavit filed in the action (R. 25), that Grant allegedly had not received a copy of the reply. The notice served on Grant calling up the hearing (R. 21) apprised Grant that plaintiff would attempt to establish his personal liability to O'Neil. A subpoena was served upon Grant (R. 36) for the express purpose of requiring him to bring with him to the hearing books and records of Utah Cash Register Exchange, Inc. which would show

transactions between Grant and O'Neil during the period in question. The Court, at the hearing's outset again apprised Grant and his counsel that this would be a hearing to determine Grant's personal liability to O'Neil as well as that of the corporation (R. 40, 41), and with Grant sitting at the side of his attorney at the counsel table, the proceedings went forward. Testimony was introduced in behalf of plaintiff, Remington Rand, and evidence was introduced by Grant. All witnesses were subjected to cross examination. The parties rested, arguments of counsel were heard and the District Court awarded a judgment in favor of O'Neil and against Dale E. Grant and Utah Cash Register Exchange, Inc. in the sum of \$3600.00, for the benefit of Remington Rand, Inc. (R. 17). The Court further announced that it found Utah Cash Register Exchange, Inc. to be the alter ego of Dale E. Grant.

Within the next few days Remington Rand was served with a notice and motion to vacate and set aside the garnishee judgment (R. 22), which motion was based on substantially the same grounds as are argued by appellants on this appeal, and in addition, upon the ground that plaintiff had failed to prepare Findings of Fact and Conclusions of Law. Grant's affidavit was appended to the motion. At the hearing the Court vacated the judgment on the ground that it was not supported by Findings of Fact and Conclusions of Law (R. 33), permitted plaintiff to immediately file such papers, and then entered



judgment nunc pro tunc in substantially the same form as the original judgment (R. 1). A further motion was filed by the garnishee defendants requesting that certain Findings of Fact be stricken (R. 29). The District Court considered the Findings and did strike five paragraphs of the same on stipulation of both parties (R. 6). A notice of appeal to this Court was filed by defendants on June 6, 1955 (R. 31).

## STATEMENT OF POINTS

I. APPELLANTS WERE AFFORDED NOTICE SUFFICIENT TO SATISFY THE REQUIREMENTS OF DUE PROCESS OF LAW.

II. THE THIRD JUDICIAL DISTRICT COURT IN AND FOR SALT LAKE COUNTY HAD JURISDICTION OVER THE DEFENDANTS TO ENTER JUDGMENT IN EXCESS OF THAT AMOUNT ADMITTED AS OWING IN THE ANSWERS OF GARNISHEES.

III. EVIDENCE WAS INTRODUCED SUFFICIENT TO SUPPORT THE FINDING BY THE COURT THAT UTAH CASH REGISTER EXCHANGE, INC. WAS THE ALTER EGO OF DALE E. GRANT, BUT THE FINDING WAS NOT, AT ANY RATE, ESSENTIAL TO SUPPORT THE JUDGMENT AGAINST GRANT PERSONALLY.

## ARGUMENT

I. APPELLANTS WERE AFFORDED NOTICE SUFFICIENT TO SATISFY THE REQUIREMENTS OF DUE PROCESS OF LAW.

The plaintiff, at all times prior to the motion of garnishee defendants to vacate and set aside the judgment, was of the impression that defendant Dale E.

Grant had a copy of the Reply to Answers of Garnishees. The writer personally placed the replies in envelopes with the notices of the hearing to be held April 18, 1955, and mailed them to Grant and O'Neil, with copies of the notice to their attorneys. But it is submitted that if Grant did not receive a copy of the reply to answers of garnishees, he should not have proceeded at the hearing, but should have objected to the procedure at that time as not giving him opportunity to prepare his case and demand a jury trial, if he wanted one. The Trial Court specifically informed Grant and his counsel as to what the hearing was designed to accomplish in the following words (R. 40):

The Court: "Well, you are not taking anything personally against Mr. Grant."

Mr. Swan: "Yes, Your Honor, we are. We have prayed for judgment in the alternative, either Mr. Grant or the corporation."

The Court: "He hasn't been garnished, has he?"

Mr. Swan: "Yes, I think your file will show two garnishments, Your Honor, one against the corporate defendant and one against Grant personally."

The Court: "Oh yes, I see; and what does he answer personally? That he owed nothing?"

Mr. Swan: "They both answered that they were not indebted."

The Third Judicial District Court Rules of Practice effective June 1, 1942 do not outline the procedure that

is to be followed in setting for hearing the traverse of a garnishment. Rule 64 D (h) is somewhat vague in that it states, "and the matter thus at issue shall be tried in the same manner as other issues of like nature." The Clerk of the District Court informed the writer that the procedure has been, as long as he recollects, to set the traverse to a garnishment on the Law and Motion Calendar. It is reasonable that if a party desires to demand a trial, this demand might be made prior to the date set for hearing, which would make necessary the setting of the case on the trial calendar. A demand for trial was not made in the instant case, although Grant admits he was served with a notice which stated:

"To the defendant, Thurman E. O'Neil, and to Dale E. Grant, and Utah Cash Register Exchange, Inc., a corporation, garnishees:

"You will please take notice that on April 18, 1955, at two o'clock p.m. plaintiff will call up in the Law and Motion Division of the above entitled Court a hearing to determine the indebtedness, if any, due Thurman E. O'Neil by the garnishees above."

As to notice of what was to transpire at the hearing, it is further submitted that the subpoena served on Grant April 16, 1955, required him to "bring with you check books on personal accounts showing disbursements in the past six months; check books on Utah Cash Register Exchange, Inc., accounts showing disbursements in the past six months; ledger of Utah Cash Register Exchange, Inc.; cancelled checks showing payments, if any, to Thurman

E. O'Neil on moneys owed him by Dale E. Grant or Utah Cash Register Exchange, Inc." It would not require much thought after reading the quotation above for Grant to determine that he would be called upon at the hearing to account as to his personal liability, if any, to O'Neil as well as the liability of his corporation. The transcript of the proceeding indicates that the hearing was carried on after the manner of a trial with opportunity for cross-examination and argument. No objection to the procedure was even intimated. It is incredible that the defendants and their counsel could have sat for two hours in that proceeding and then, in their brief, contend that "it was only afterward when appellant and his counsel examined the file that it became fully clear that the appellants had been submitted to an actual trial on the 'Reply to Answers to Garnishment' which had never been served on them."

As to the proceeding following the theory as set forth in plaintiff's reply to answers of garnishees, the record is clear that the indebtedness of Grant and/or Utah Cash Register Exchange, Inc. to O'Neil grew out of a loan by O'Neil of some \$3,000.00, and also the value of the stock of merchandise and equipment transferred in apparent violation of the Bulk Sales Act of Utah and contributed to Grant's business. The allegation in defendants' brief that plaintiff's witness E. L. White actually held a bill of sale to the merchandise appellants actually did have in their possession is true in a sense only, since E. L. White did not hold a bill of sale, but a

document entitled bill of sale, taken for security purposes only (R. 67), which clearly should be viewed as a chattel mortgage. The answer of Utah Cash Register Exchange, Inc. to the Writ of Garnishment stating that it "had in its possession items listed in your praecipe of March 15 subject to a bill of sale in favor of Mr. E. F. White, apparently for security reasons," is an admission by defendant that they were aware of the nature of the document.

It is true that the reply to answers of garnishees contended Utah Cash Register, Inc. was the alter ego of appellant Dale E. Grant. The Trial Court so found. The portion of the transcript quoted in appellants' brief wherein the witness Snyder was asked: "Q: And did Mr. Grant on that occasion state the reason for the incorporation of Utah Cash Register? A: Well, I presume limited liability is the understanding that I had out of the conversation", can mean many things. Plaintiff concedes that limited liability is a legitimate purpose for incorporation, and that, presumably, all of the stock in a corporation could be held by one individual and yet a Court find the corporation a separate entity from the person owning those shares. But the transcript read as a whole clearly reveals the reason for the incorporation of Utah Cash Register Exchange. The question of the sufficiency of the evidence to sustain a finding that Utah Cash Register Exchange, Inc. was the alter ego of Dale E. Grant will be discussed hereafter.

The due process of law provision of Section 7, Article 1, Constitution of the State of Utah, and the provision of the 14th Amendment to the Constitution of the United States do not guarantee to an individual either a trial by jury (67 A.L.R. 1075, 91 A.L.R. 74) or the opportunity to use the pretrial techniques of the Federal Rules of Civil Procedure and the Utah Rules which follow them in substance.

The appellants cite 88 A.L.R. 1148 as supporting the proposition that a garnishment proceeding should be set on the trial calendar, "particularly if the garnishee demands the same." Plaintiff concedes that if the defendants demand a trial setting it is proper that the same should be given, but the opportunity was given the defendants in this proceeding to demand a trial setting on the regular trial calendar and they did nothing.

It is further submitted that the traverse of a garnishment is in the nature of a proceeding supplemental to judgment. Some courts in this country have ruled that the garnishees are not entitled to a jury trial because the nature of a garnishment proceeding is that of a proceeding supplemental to judgment (88 A.L.R. 1148). As stated in the case of *Huntington vs. Bishop*, 5 Vermont 186 (1832), "the proceeding against the trustee (garnishee) is a mere incident to the principal suit. This proceeding, as already observed, is a creature of the statute, a part of the attachment law; and the object of it is mere-

ly to secure the estate of Spooner (the trustee) to respond to the judgment which may be recovered in the principal suit."

There is an issue involved in every hearing on an order for supplemental proceedings, pursuant to Rule 69 (k), Utah Rules of Civil Procedure, yet these hearings are normally set in the Law and Motion Division of the Court and in many cases, a defendant's rights to certain property are affected by the determination of the Judge. It seems that due process of law is fully met by service of the notice of the hearing itself, with an opportunity for cross-examination at the hearing, without the requirement of a notice setting forth the theory on which the plaintiff intends to proceed at the hearing.

Rule 64 D (h), Utah Rules of Civil Procedure, stating that "Judgment shall be entered upon the verdict or finding the same as if the garnishee had answered according to such verdict or finding," indicates that the rule contemplates a proceeding in the nature of a trial, and further, a jury trial, if it is demanded. The plaintiff does not deny that this is probably a correct construction of the rule, but, as a complete answer states that the defendants had the opportunity to demand a trial setting, a jury, and anything further that the Utah Rules of Civil Procedure give contesting parties in a law suit. A reading of the transcript in the light of the contents of papers that had been served on defendants Grant and Utah Cash Register Exchange, leave one with the impression that

Grant, knowing what was to transpire at the hearing on April 18, 1955, waived all of the benefits he now seeks, by appearing with counsel and submitting to a trial on the merits. As an afterthought, when a sizeable judgment is awarded against him, he then seeks to show that he had no notice of the proceeding. The only thing that can be complained of is the alleged failure of the plaintiff to serve Grant with a copy of the reply to answers of garnishee and the only statement in the record on this subject is the self-serving affidavit of Grant. His attorney could not be sure to this day whether Grant actually received a copy of the reply.

II. THE THIRD JUDICIAL DISTRICT COURT IN AND FOR SALT LAKE COUNTY HAD JURISDICTION OVER THE DEFENDANTS TO ENTER JUDGMENT IN EXCESS OF THAT AMOUNT ADMITTED AS OWING IN THE ANSWERS OF GARNISHEES.

The contention of the defendants that the failure of plaintiff, if any, to serve the reply upon the garnishees was jurisdictional falls when it is considered that the garnishee defendants with their counsel appeared on the date for hearing and submitted themselves to a trial on the merits without at any point in the proceeding voicing protest to the jurisdiction of the District Court. Grant's appearance with his attorney and his participation in the garnishment proceeding constituted a general appearance. The test for determining when such a general appearance has occurred has been said to be whether the complaining party has taken any action "which recognizes the case as in court." *State*



*ex rel. Northwestern Colonization & Improvement Co. of Chihuahua vs. Hull, et al.*, 168 P. 528, (New Mexico, 1917), *Hammond, et al vs. District Court of Eighth Judicial District of New Mexico et al*, 228 P. 758 (New Mexico, 1924). The Supreme Court of Idaho has decided that participation in a trial by examining and cross-examining witnesses constituted a general appearance. *Poage vs. Co-operative Publishing Co., et al.*, 66 P. 2d 1119, 110 A.L.R. 1322 (1937).

The appellants need not have had much foresight to suppose that what plaintiff was seeking was not a judgment awarding them the equipment which Grant had admitted as being on his premises, and which he conveniently stated was not claimed by Utah Cash Register Exchange, Inc., but rather, to impose additional liability on the defendants because of an indebtedness to O'Neil. Pursuant to Rule 64 D (h), "Judgment was entered upon the finding the same as if the garnishees had answered according to the finding." The plaintiff was entitled to a judgment for such amount as the Court should find was due and owing O'Neil by the garnishee defendants, without being limited in any manner by the answers of the garnishees to the writs.

III. EVIDENCE WAS INTRODUCED SUFFICIENT TO SUPPORT THE FINDING BY THE COURT THAT UTAH CASH REGISTER EXCHANGE, INC. WAS THE ALTER EGO OF DALE E. GRANT, BUT THE FINDING WAS NOT, AT ANY RATE, ESSENTIAL TO SUPPORT THE JUDGMENT AGAINST GRANT PERSONALLY.

The stock distribution of the corporation (495 shares to Grant, 2 shares to his brother-in-law and 3 shares to his wife) admittedly would not, in and of itself, support the finding, but with a background of the steps that were taken in order to conceal O'Neil's assets from his creditors and dispose of them through a newly organized corporation in which O'Neil appeared neither as an owner or stockholder, the purpose of the organization of the corporation by Grant can be readily inferred. Consider the following: The transfer of the equipment from the Provo, Utah store to Utah Cash Register Exchange was never evidenced by a bill of sale (R. 43, 93). The amount which Grant or Utah Cash Register Exchange agreed to pay O'Neil for his contribution in cash and equipment was never reduced to writing, except for the notes made by Snyder when requested to arbitrate, because, according to Snyder, "Mr. O'Neil had too many creditors, I believe looking for him at that particular time to show where he had any assets." (R. 50). There was no opening inventory taken at the time Utah Cash Register began its existence, and Snyder indicated that the reason for taking no inventory was for the same reason that money owed O'Neil was not reduced to writing (R. 50). Dale Grant personally helped E. F. White, Mr. O'Neil and White's brother-in-law transfer merchandise from the Provo store to Utah Cash Register at 153 East 2nd South, Salt Lake City (R. 59) and knew O'Neil was insolvent (R. 93). The transfer of the equipment was made sometime during the month

of July and the corporation commenced doing business August 1, 1954. On direct examination Grant admitted that the figure of \$3600.00 or thereabouts arrived at as the figure owed O'Neil by Grant was "high and encompassed so much of it being the equipment." (R. 76). Clearly Grant intended to pay for the equipment which he was using in his business, although he disputes the figure arrived at. It appeared that the valuable Sweda franchise which O'Neil owned while doing business in Provo would be lost unless an outlet were found in the area for the distribution of Sweda Cash Registers through a corporation or business entity with O'Neil's name completely out of the picture (R. 80). At the start of the business, according to Grant, "we had some Sweda Cash Registers. \* \* \* I presume they were from his (O'Neil's) Salt Lake store" (R. 81). On August 4, shortly after the corporation was organized, Grant redeemed a mortgage at the Woods Cross bank using \$3,000.00 in cash turned over to him by O'Neil, and which mortgage covered Sweda Cash Registers which had a valuation in excess of the amount paid to redeem them. (R. 81). These Swedas became part of the merchandise sold at Utah Cash Register Exchange, Inc., yet no bill of sale or other orderly transfer was made from O'Neil to Grant. A chattel mortgage covering certain Sweda Cash Registers previously belonging to O'Neil was executed to a Mrs. Cottle, which mortgage was outstanding at the time of the hearing, and the note supporting such chattel mortgage was signed personally by Grant, Snyder and O'Neil (R. 92, 99).

The question whether a corporation should be disregarded depends upon questions of fact. 1 Fletcher on Corporations, Sec. 41. This Court has stated in the case of *Western Securities Company vs. Spiro*, 62 Utah 623, 632, 221 P. 8:

“That, under certain circumstances, the legal entity of a corporation must be entirely disregarded was clearly pointed out by the Court in the case first cited above (*Louisville Banking Company vs. Eisenman*, 94 Ky. 83, 21 S.W. 531, 1049). The courts have had frequent occasion to consider facts and circumstances similar or analogous to those in the case at bar, and to apply the law to such facts and circumstances. It would be a mere travesty of justice if courts could or should refuse to look behind the mere form of a transaction in order to ascertain the real truth, and reach and hold responsible the real parties in interest. \* \* \*

“In the case of *First National Bank vs. Treblin Co.*, 59 Ohio St. 316, 59 N.E. 834, the proposition that a corporate entity may be entirely disregarded in order to reach and protect the real parties in interest and to disclose the real transaction is well illustrated and applied. See also *In re Muncy Pulp Co.*, 139 F. 546, 71 C. C. A. 530. In 14 C. J., Sec. 21, page 61, the law is stated thus: ‘The abstraction of the corporate entity should never be allowed to bar out and prevent the real and obvious truth’.”

It was certainly apparent from the facts disclosed at the hearing that Dale Grant, as well as O’Neil and Snyder, used the corporate entity as a channel through

which they might conduct their personal business. The transcript shows that it was O'Neil and Grant who made the contributions in money and other property to the corporation which enabled it to commence its operation, yet the record is entirely silent as to any stock ownership in O'Neil. On the other hand the record is silent as to any contribution other stockholders, members of Grant's family, made in consideration for their stock.

The case of *Geary vs. Cain*, 79 Utah 268, 9 P. 2d 396, involved a case of family ownership of the shares of a corporation and an attempt to disregard the corporate entity and hold the individuals liable. The Court at page 273 stated:

"A showing that Cain owns all, or substantially all, of the outstanding shares of the Doris Trust Company, or that the persons in whose names they stand hold the same in trust for him, is vital to the plaintiff's case under her first theory. Courts of equity and courts of law as well, and courts which administer both law and equity in the same action, as do the courts of this state, will, to prevent fraud and accomplish justice, in proper cases ignore the legal fiction that a corporation is a person separate and distinct from the person or group of persons who own its stock. *Western Securities Co. vs. Spiro*, 62 Utah 623, 221 P. 856; *D. I. Felsenthal Co. vs. Northern Assurance Co.*, 284 Ill. 343, 120 N.E. 268, 1 ALR 602, and annotation on page 610. It is this doctrine which the plaintiff would have us apply in this case. It would be applicable, assum-

ing that all other necessary facts appear, if Cain in fact owned the stock or if his three children who appear to own the shares, were shown to be mere trustees for him in the ownership thereof. But otherwise such doctrine can have no application. The corporate entity cannot be ignored where, as here appears, the stock is owned by the children, and it does not appear that they hold title to the shares in trust for their father. (Citing cases.) The doctrine is generally applied by the courts when they have to deal with what in colloquial language are called 'one man' corporations. It is not necessarily applied when they are dealing with what are called 'family' corporations. The corporation whose affairs were involved in *Western Securities Co. vs. Spiro*, supra, is typical of the former kind; the one involved in *Elenkrieg vs. Siebrecht* is typical of the latter. The doctrine simply means that the courts, ignoring forms and looking to the substance of things, will regard the stockholders of a corporation as the owners of its property, or as the real parties in interest, whenever it is necessary to do so to prevent a fraud which might otherwise be perpetrated, to redress a wrong which might otherwise go without redress, or to do justice which might otherwise fail."

In the Cain case, the children owned all but one share of the corporation stock, and it did not appear from the evidence that the shares were held in trust for the defendant, Addison Cain. It is submitted that in the instant case the stock distribution, coupled with the facts set forth above, present sufficient grounds for the Court to "ignore the form and look to the sub-

stance of things" and "regard the stockholder (in this case Grant) as the owner of its property or as the real party in interest, in order to prevent a fraud which might otherwise be perpetrated."

It should be kept in mind that the discretion of the court is, to a great extent, applied in the matter of disregarding the corporate entity. As stated in the case of *Scola vs. Merrill*, 91 Utah 253, 301; 64 P. 2d 185, "There should and must be as much elasticity in the application of that principle as there is ingenuity in the attempts to prostitute the fiction to the accomplishment of wrongful purposes. Each case must be determined upon its own facts." It is further submitted that the Trial Court, having an opportunity to appraise the witnesses before it at the trial, could discern from their demeanor, as well as from their response to questions asked, whether they were telling the truth regarding the transactions.

Finally, the plaintiff need not rely on the finding by the Trial Court that Utah Cash Register Exchange, Inc. was the alter ego of Dale E. Grant in order to support the judgment against Grant personally. Snyder testified for plaintiff that Grant was indebted to O'Neil in December of 1954 in the amount of \$3,020.00, which sum "represents the money that O'Neil gave *Mr. Grant* to pay off a certain mortgage, chattel mortgage at Farmers State Bank" (italics ours). The loan of money was presumably to Grant personally, there appearing

no promissory note to clarify whether the loan was made to Grant or to the corporate entity. A notion of the way in which Grant himself treated the money loaned by O'Neil is revealed at page 77 of the transcript where Grant makes the statement, "He loaned *me* some money at the start of my organization, and the object I think that he, O'Neil, had was to provide himself with some form of employment or commission basis, that I told him he could work on commission if he wished, and provide a job" (italics ours).

## CONCLUSION

It is anything but true that the procedure followed in the instant case illustrated "an attempt by plaintiff's counsel to dispense with court procedure as some necessary evil to be dispensed with by sleight of hand." When the entire record and transcript are studied, it becomes apparent that the defendants were given notice of the hearing and substantial information concerning what was to transpire at the hearing in order to afford them due process. The Court had jurisdiction over the proceeding and heard the testimony of witnesses for both sides and ruled on the matter after hearing arguments of counsel. The entire picture presented at the hearing was one of an attempt at evasion of the Bulk Sales Law of Utah coupled with an attempt by O'Neil



and Grant, et al, to conceal from O'Neil's creditors the assets of the A-1 Typewriter Stores in Salt Lake City and Provo. As the Trial Court remarked after awarding judgment against Grant for the benefit of Remington Rand, Inc., "When you play with fire, you're apt to get burned."

Respectfully submitted,

SKEEN, THURMAN,  
WORSLEY & SNOW and  
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